

DERRICK C. ONNEN)
 Claimant)
V.)
))
THE MONARCH CEMENT CO.) CS-00-0072-007
 Respondent) AP-00-0448-400¹
AND)
))
LIBERTY MUTUAL FIRE INSURANCE CO.)
 Insurance Carrier)

¹ Formerly Docket No. 1,085,467.

Respondent asserts that clinker does not have potassium dichromate as one of its ingredients and that Dr. Prossick did not know what ingredients are in clinker. Respondent also asserts the judge injected facts that were not in the record when he relied on his own experience with concrete and consulted three internet websites and relied on them for his decision.

Respondent's application for review raises the following issues:

1. Did the judge go outside the evidentiary record to make factual findings and legal conclusions not supported by the evidentiary record?

2. Did claimant suffer a chemical exposure (accident or occupational disease) arising out of and in the course of employment; specifically, was claimant's alleged chemical exposure the prevailing factor causing his current medical condition and disability?

FINDINGS OF FACT

The undersigned adopts the facts as set forth on pages two and three of Judge Roth's Preliminary Hearing Order. The undersigned notes that on September 11, 2019, Dr. Prossick indicated in addition to potassium dichromate, claimant had an allergic reaction to: cocamidopropyl betaine, a sudsing agent in soaps/cleansers/lotions; oleamidopropyl dimethylamine, another sudsing agent; propylene glycol, a solvent/moisturizer used in many household and industry products; propolis, a wax-like substance used as a fragrance; black rubber mix and thiuram mix found in rubber products, including gloves; and iodopropynyl butylcarbamate, a preservative in personal and industry products. She also stated claimant was on medical leave for three months and was faring better. On September 24, Dr. Prossick indicated she was concerned with claimant's exposure to cement at respondent's plant and opined his exposure to chrome in the cement started his allergic contact dermatitis.

At the preliminary hearing, respondent placed several documents into evidence, including a document with a list of ingredients for clinker. That document indicated potassium dichromate was not an ingredient of clinker. However, there were more than 15 other ingredients of clinker.

The judge found:

The most direct evidence Respondent has to refute the above is:

1. Respondent does not put potassium dichromate--the chemical culprit making Claimant's rash-- in their "recipe" when making concrete.

Respondent's defense has a determinative quality and a strong appeal to logic. That logic, however, does not appear to withstand a closer review of the chemistry between potassium dichromate and cement.

In another life, the Court did some masonry work and has basic practical experience in working with concrete. While such personal experience is not evidence, there is longstanding law that a trier of fact is encouraged, even required, to bring their own life experience and knowledge when weighing evidence. *State v. Sanders* 224 Kan. 138 (1978); Pattern Instructions for Kansas- Civil 3rd, 102.20.

To that end, skin contact with concrete often creates irritation. The degree of irritation, or "concrete burn," as it is commonly called, depends greatly on the length of exposure and on each individual's propensity or skin sensitivity. The court recalls that there were warnings printed on bags of concrete and mortar mix warning of risks from prolonged skin exposure- warnings not unlike those found on Monarch's website.²

The chemistry that appears to cause this irritation is, as pointed out by Dr. Prossick, the presence of chrome or chromium in cement. (Exh. A4) Limestone and clay are major [components] to cement, particularly Portland cement. The concentration of limestone and clay correlates to the concentration of chromium, [particularly] trivalent chromium in both of these two products.³ All by itself, heavy concentrations of trivalent [chromium] carry some level or risk to general health.⁴ That risk is increased, however, if potassium hydroxide (K20) is added. It is the [combination] of the chromium and potassium that creates potassium dichromate. Again, it is potassium dichromate that is identified by Dr. Prossick as creating Claimant's skin problems.

If you look on the chemical compound list, you find potassium hydroxide (K20). Also present is limestone (cr203). Again the mixing of these two create, in

² See <https://monarchcement.com>. Instructions for exposure to skin reads, "Wash with plenty of pH neutral soap and water. Take off contaminated clothing. Wash contaminated clothing before reuse. If skin irritation or rash occurs, get medical attention. Persons already sensitized may react to the first exposure to cement. The symptoms of allergic reactions may include reddening of the skin, rash, and irritation. Symptoms of chronic exposure to wet cement may include reddening, irritation, and eczematous rashes. Drying, thickening, and cracking of the skin and nails may also occur."

³ See <https://www.sciencedirect.com> "Analysis of the Chromium Concentrations in Cement Materials", 2012. Also noted are other industries that work with high levels of chromium, in addition to cement-producing plants are ore refining, chemical and refractory processing, automobile brake lining and catalytic converters for automobiles, leather tanneries. See, U.S. Environmental Protection Agency. Toxicological Review of Trivalent Chromium. National Center for Environmental Assessment, Office of Research and Development, Washington, DC. 1998.

⁴ Wilbur S, Abadin H, Fay M, et al. Toxicological Profile for Chromium. Atlanta (GA): Agency for Toxic Substances and Disease Registry (US); 2012 Sep. 3, HEALTH EFFECTS. Available from: <https://www.ncbi.nlm.nih.gov/books/NBK158851/>

lesser or greater degrees, the strength of the potassium dichromate present in the concrete.

Respondent's counsel is correct. Monarch does not include or add [potassium] dichromate to their cement. But they do add other chemical compounds that, when combined, make potassium dichromate.

At the risk of an over-simplified analogy, if you are merely exposed to ingredients of barley, water, yeast and hops alone, you would never become intoxicated. However, if you mix and ferment barley, water, yeast and hops together, the result is beer. If you are exposed to too much beer you can become in *[sic]* intoxicated. In the same way, the elements listed in exhibit B1 and B2 may alone not result in the offensive, acid-burning that comes from exposure to potassium dichromate that plagues the Claimant, but if you combine certain of these same elements the acid element of potassium dichromate [occurs]. Perhaps this is why Monarch had Claimant wear a HAZMAT suit while performing his job duties.

The findings of Dr. Prossick are accepted, in light of the understanding of how potassium dichromate makes its appearance in concrete.⁵

PRINCIPLES OF LAW AND ANALYSIS

Respondent first argues the judge went outside the evidentiary record to make factual findings and legal conclusions not supported by the evidentiary record. As the judge indicated in the Preliminary Hearing Order, he is allowed to use his life experience in weighing evidence. Respondent does not necessarily disagree with this premise as it is well established. In *State v. Smith*,⁶ the Kansas Court of Appeals stated, "Further, jurors are allowed to use their common knowledge and life experience to evaluate the evidence. *State v. McCarty*, 271 Kan. 510, 517, 23 P.3d 829 (2001)."

Respondent is correct that the judge considered and relied on information from three internet websites to make his decision. In *Bohl*,⁷ the Kansas Supreme Court stated:

In cases tried to the court it is generally held the court has great leeway in deciding the facts. It is its duty to assess and weigh the testimony of the witnesses. *Crow v. City of Wichita*, 222 Kan. 322, 334, 566 P.2d 1 (1977); *Service Oil Co., Inc. v. White*, 218 Kan. 87, 542 P.2d 652 (1975). In doing so it may take into account any inferences legitimately to be drawn from the evidence before him. It cannot,

⁵ Judge's P.H. Order at 4-5.

⁶ *State v. Smith*, No. 119,262, 2019 WL 3047353 (Kansas Court of Appeals unpublished opinion filed July 12, 2019).

⁷ *Bohl v. Bohl*, 232 Kan. 557, 564, 657 P.2d 1106 (1983).

however, go beyond the facts and base its findings on extraneous materials. *Meador v. Ranchmart State Bank*, 213 Kan. 372, 517 P.2d 123 (1973).

In *Steinbrook*,⁸ a Board Member ruled that the judge exceeded his jurisdiction by considering a medical record not in evidence. Simply put, Judge Roth exceeded his jurisdiction by considering evidence from three websites that were not in the record.

At this juncture, the undersigned can vacate the Preliminary Hearing Order and remand this case to the judge with instructions to decide the case without considering information he obtained from the three websites or decide the remaining issues raised by respondent. This Board Member chooses the second alternative. Board review of a judge's order is de novo on the record.⁹ The definition of a de novo hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made by the judge.¹⁰ The Board, on de novo review, makes its own factual findings.¹¹

Respondent first argues claimant did not suffer a chemical exposure. The undersigned disagrees. The facts are undisputed that claimant believed his protective suit tore while cleaning a heating tower where clinker, a product used to make cement, was made. He immediately experienced skin irritation and burning and reported the incident to his supervisor.

The next issue is whether claimant's exposure to chemicals from the clinker was the prevailing factor causing his injury or condition and disability. On this issue, the undersigned finds in favor of claimant.

In *Armstrong*,¹² Armstrong's job was to remove floating solids and grease from sewage at the City's plant. He noticed the greases were of an unusual texture and odor and he developed nausea and headaches. He used a filter mask, but could still smell the odor and within a day and a half became so ill he could not work. The Board ruled Armstrong's condition resulted from his exposure to chemicals at work, which resulted in his disability. The Kansas Court of Appeals stated:

⁸ *Steinbrook v. Lifetime Surfaces*, No. 1,037,623, 2008 WL 4149971 (Kan. WCAB Aug. 11, 2008).

⁹ See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

¹⁰ See *In re Tax Appeal of Colorado Interstate Gas Co.*, 270 Kan. 303, 14 P.3d 1099 (2000).

¹¹ See *Berberich v. U.S.D. 609 S.E. Ks. Reg'l Educ. Ctr.*, No. 97,463, 2007 WL 3341766 (Kansas Court of Appeals unpublished opinion filed Nov. 9, 2007).

¹² *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 755-57, 907 P.2d 923 (1995), *rev. denied* 259 Kan. 927 (1996).

In summary, the record in this case shows a claimant who was ill. He can no longer work; he exhibits a variety of symptoms which he describes in detail and which are largely unchallenged. He traces his illness to an exposure to something floating around in the Wichita sewer lines. He was never the same after that exposure. It seems obvious that something is wrong with claimant, but no two of the expert witnesses can agree on what it is. In the face of this confusion, the Board concluded that claimant is sick, that he has a condition or disease that he contracted while working for the City, and that it is this disease that is making him sick. No two experts can agree on what it is, so the Board stated it does not matter whether it has a name—claimant is sick, and his sickness is compensable.

...

We adopt the reasoning of *Chinn v. Gay & Taylor* and other like cases and extend that reasoning to cases involving occupational disease. While the medical testimony may be of greater value in an occupational disease case, we decline to hold that a worker's illness is not compensable simply because the medical experts cannot give it a name. We do not believe that the legislature intended to deny compensation to a worker who is disabled by a condition which baffles medical experts and which resists their efforts to give it a specific name or diagnosis. No doubt, thousands of people died of AIDS before our medical community was able to agree on a specific diagnosis of that condition or the specific name. Notwithstanding the lack of a name for their disease, these people were sick and they died. They remain dead to this day. Chronic fatigue syndrome is the name of a condition relatively new in the medical lexicon. Yet, surely there were thousands of people who suffered from that disorder before it had a name. A claimant in a workers compensation proceeding need only prove that he or she suffers from a disease contracted as a result of his or her employment by the respondent. It is of no great moment that the condition from which a claimant suffers cannot be precisely diagnosed and named by the medical experts.

Having considered the evidence in the record, the undersigned concludes claimant met his burden of proving prevailing factor. Dr. Prossick diagnosed claimant with contact dermatitis. She stated claimant was doing better after being off work for three months. She noted claimant intensely reacted to potassium dichromate, but indicated he also reacted positively to several other allergens. The facts in the present claim are similar to those in *Armstrong*. Both Armstrong and claimant knew when and how they became exposed to the offending agent. Following their exposure, both men immediately began experiencing symptoms. While Dr. Prossick may not have determined exactly what allergens in the clinker caused claimant's adverse reaction, he experienced immediate skin irritation and burning. Dr. Prossick opined claimant's exposure to cement caused claimant's medical condition. Dr. Prossick was not contradicted.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.¹³ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2018 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹⁴

WHEREFORE, the undersigned Board Member affirms the December 11, 2019, Preliminary Hearing Order entered by Judge Roth.

IT IS SO ORDERED.

Dated this ____ day of February, 2020.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

c: Patrick C. Smith, Attorney for Claimant (via OSCAR)
Kip A. Kubin, Attorney for Respondent and its Insurance Carrier (via OSCAR)
Honorable Steven M. Roth, Administrative Law Judge

¹³ K.S.A. 2018 Supp. 44-534a.

¹⁴ K.S.A. 2018 Supp. 44-555c(j).